ANEKA RETAIL (M) SDN BHD v. MAHKAMAH PERUSAHAAN MALAYSIA & ORS

HIGH COURT MALAYA, PULAU PINANG
ANAND PONNUDURAI J
[JUDICIAL REVIEW NO: PA-25-38-08-2022]
10 JANUARY 2023

Abstract – *One way to ascertain if an appeal or judicial review is to be utilised is to consider who referred the representation to the Industrial Court for an award. If the representation is referred to the Industrial Court by the Director General, then an appeal ought to be filed pursuant to s. 33C of the Industrial Relations Act 1967 as amended. However, if the representation is referred to the Industrial Court by the Minister, as in this case, then quite clearly, such reference is made pursuant to s. 20(3) of the Industrial Relations Act 1967 as unamended, and judicial review would be the proper application to be made.*

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application for – Application for leave to apply for order of certiorari to quash awards – Whether applicant correctly utilised judicial review proceedings or ought to have filed appeal under s. 33C of Industrial Relations Act 1967 ('IRA') – Whether representation referred to Industrial Court by Minister – Whether reference made pursuant to s. 20(3) of IRA as unamended – Industrial Relations (Amendment) Act 2020, s. 35 – Rules of Court 2012, O. 53 r. 3(2)*

CIVIL PROCEDURE: *Stay of execution – Application for – Industrial awards handed down in favour of employees – Whether employees have legitimate fear they may not recover award sums from company – Whether granting of stay would deprive employees of fruits of litigation – Whether conditional stay most appropriate and fair order*

The respondents were former directors/employees of the applicant company who were paid monthly salaries. Due to the applicant's continuing losses, the respondents had taken a pay-cut since 2018. However, their salaries were then not paid at all, in the months of April and May 2020, which led them to consider themselves as having been constructively dismissed. The respondents then made their respective representations for reinstatement pursuant to s. 20 of the Industrial Relations Act 1967 ('IRA'). The Chairman of the Industrial Court noted that the dispute was referred to the Industrial Court *via* a letter dated 6 January 2021 by the Minister of Human Resources pursuant to s. 20(3) of the IRA. Thereafter, following a full trial conducted in the Industrial Court, the Chairman handed down two separate awards (Award Nos. 1630 and 1631) in respect of both respondents. In both cases,

the Chairman concluded that the respondents were constructively dismissed on account of fundamental breaches of their contract of employment *ie*, non-payment of salary and ordered the second respondent to be paid a sum of RM210,000 and the third respondent RM169,000 as backwages and compensation. Dissatisfied, the applicant filed this application, pursuant to O. 53 of the Rules of Court 2012 ('ROC') for leave to apply for an order of *certiorari* to quash the said awards and also sought an order to stay the execution of the award sums pending disposal of the judicial review application. At the first case management date, an issue arose as to whether the applicant had correctly utilised judicial review proceedings or ought to have filed an appeal under s. 33C of the IRA which came into force on 1 January 2021 *vide* Industrial Relations (Amendment) Act 2020 ('Amendment Act'). In this regard, the respondents contended that the applicant ought to have filed an appeal and not proceed *via* a judicial review application.

Held (granting leave to apply for order of *certiorari*; ordering conditional stay of award sums):

(1) The applicant had correctly proceeded *via* judicial review and not *via* an appeal. Apart from amending the IRA to insert an appeal provision *via* the new s. 33C, s. 20 of the IRA in relation to the reference of the representation had also been amended. Prior to the said amendment, if there is no likelihood of the representation being settled, the Director General shall notify the Minister and it is the Minister who then has the discretion whether or not to refer the said representation to the Industrial Court for an award. This discretion exercised by the Minister has often in itself been the subject of judicial review applications. However, this provision relating to the Minister's discretion was amended by the Industrial Relations (Amendment) Act 2020 in that the discretion of the Minister had been removed and is now replaced with s. 20 of the IRA. As such, pursuant to the amendment, it is now the Director General who is mandated to refer a representation to the Industrial Court for an award if there is no likelihood of the representation being settled. One way to ascertain if an appeal or judicial review is to be utilised is to consider who referred the representation to the Industrial Court for an award. (paras 17-20)

(2) If the representation was referred to by the Industrial Court by the Director General, as mandated by the amended provision, then an appeal ought to be filed pursuant to s. 33C of the IRA as amended. However, on the other hand, if the representation was referred to the Industrial Court by the Minister, then, such reference was made pursuant to s. 20(3) of the IRA as unamended and in which case, judicial review would be the proper application to be made. On the facts of this

A case, it was the Minister who referred the representation and not the Director General. The fact that the Minister's letter was dated 6 January 2021 made no difference as it was the Minister who was exercising his discretion in referring the representation pursuant to the IRA as unamended. Further, that judicial review was properly utilised B in this case was fortified by the saving and transitional provision in s. 35 of the Amendment Act. (paras 21-24)

(3) The representations for reinstatement under s. 20 of the IRA were made by the two respondents in 2020 prior to the amendments taking effect. As such, in light of the saving and transitional provision, the applicant C was certainly entitled to proceed *via*, judicial review proceedings as if the principal Act had not been amended by the Amendment Act. As such, the applicant had correctly utilised judicial review proceedings in its effort to challenge the two awards. The applicant had provided sufficient grounds pursuant to O. 53 r. 3(2) of the ROC for this court to grant D leave. As long as an application was not frivolous or an arguable case had been presented, leave ought to be granted as the threshold at the leave stage is low. (paras 25 & 26)

(4) Granting a stay of execution would, in effect, be depriving the respondents of the fruits of litigation. Bearing in mind the applicant's E continuing financial losses, the respondents certainly had a legitimate fear that they may not be able to recover the award sums ultimately in the event of the applicant ceasing business. Thus, a conditional stay was ordered, in that the applicant was to deposit the award sums with the respondents' solicitors to be held in an interest-bearing account pending F the outcome of the substantive judicial review application. This was the most appropriate and fair order to be made so as to allay both parties' fear. (paras 28-30)

Case(s) referred to:

Almurisi Holding Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2020] 1 LNS 1439 HC ***(refd)***

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Dhaya Maju LTAT Sdn Bhd v. Kerajaan Malaysia & Anor [2021] 1 LNS 997 HC ***(refd)***

Godfrey Philips (Malaysia) Sdn Bhd v. Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan, Malaysia [2011] 9 CLJ 670 HC ***(refd)***

Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd; Tetuan Isharidah, Ho, Chong & Menon (Garnishee) [2000] 3 CLJ 361 HC ***(refd)***

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Ng Chang Seng v. Technip Geoproduction (M) Sdn Bhd & Anor [2021] 1 CLJ 365 CA ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Renew Capital Sdn Bhd & Ors v. ADM Ventures (M) Sdn Bhd & Anor And Another Appeal [2022] 8 CLJ 817 CA ***(refd)***

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Thean Heong Sauce Maker v. Industrial Court Malaysia & Anor [2022] 1 LNS 2104 HC ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 20(3), 33C
Industrial Relations (Amendment) Act 2020, s. 35
Rules of Court 2012, O. 53 r. 3(2)

For the applicant - Pavitra Loganathan & Sachpreetraj Singh Sohanpal; M/s Raj & Sach
For the 1st respondent - Rahazlan Affandi; SFC
For the 2nd & 3rd respondents - Ooi Zie Yiong; M/s Phee, Chen & Ung

Reported by Suhainah Wahiduddin

JUDGMENT

Anand Ponnudurai J:

Introduction

[1] This is an application pursuant to O. 53 of the Rules of Court 2012 for leave to apply for an order of *certiorari* to quash Industrial Court Award Nos. 1630 of 2022 and 1631 of 2022 both dated 25 July 2022.

[2] At the first case management date, an issue arose as to whether the applicant had correctly utilised judicial review proceedings or ought to have filed an appeal under s. 33C of the Industrial Relations Act 1967 (hereinafter referred to the as the said "1967 Act") which came into force on 1 January 2021 *vide* Industrial Relations (Amendment) Act 2020 Act A1615. In this regard, learned Senior Federal Counsel contended that the applicant ought to have filed an appeal and not proceed *via* a judicial review application.

Background Facts

[3] The two respondents were former directors/employees of the applicant company who were paid monthly salaries. Due to the applicant's continuing losses, the two respondents had taken a pay cut since 2018. However, their salaries were then not paid at all in the months of April and May 2020 which led them to consider themselves as having been constructively dismissed with effect from 8 June 2020.

[4] Both respondents then made their respective representations for reinstatement pursuant to s. 20 of the 1967 Act within the prescribed 60 days of their dismissal.

[5] From para. 1 of the said awards, the learned Chairman of the Industrial Court notes that the dispute was referred to the Industrial Court *via* a letter dated 6 January 2021 by the Minister of Human Resources pursuant to s. 20(3) of the 1967 Act.

[6] Thereafter, following a full trial conducted in the Industrial Court, the learned Chairman handed down two separate awards (Award Nos. 1630 of 2022 and 1631 of 2022) dated 25 July 2022 in respect of both respondents. In both cases, the learned Chairman concluded that the respondents were

constructively dismissed on account of fundamental breaches of their contract of employment *ie*, non-payment of salary and ordered the second respondent to be paid a sum of RM210,000 and the third respondent RM169,000 as backwages and compensation within 30 days from the date of the award.

[7] Being dissatisfied with the said awards, the applicant had within the prescribed 90 days period filed this present application pursuant to O. 53 of the Rules of Court 2012 for leave to apply for an order of *certiorari* to quash the said awards and also sought an order to stay the execution of the award sums pending disposal of the judicial review application.

[8] On the first case management date, learned Senior Federal Counsel had informed the court that they were objecting to the present application for leave on the basis that the applicant ought to have filed an appeal pursuant to s. 33C of the 1967 Act as amended.

[9] In light of such objection, I then fixed the leave application for hearing and also ordered that the cause papers be served on the respondents' counsel so that the stay of execution application could be heard *inter partes*.

[10] Having subsequently heard all parties on 4 January 2023, I was of the considered view that the applicant had correctly commenced proceedings by way of judicial review. I then granted leave to the applicant to apply for an order of *certiorari* to quash the said awards.

[11] I further ordered a conditional stay of the award sums, in that the applicant is to deposit the award sums with the respondents' solicitors within 14 days to be held in an interest-bearing account pending the outcome of the substantive judicial review application.

[12] I will now provide the reasons for my decision.

Judicial Review Or Appeal

[13] Prior to the amendment made in January 2021 *vide* Industrial Relations (Amendment) Act 2020 Act A1615, any party aggrieved by a decision or award of the Industrial Court would ordinarily resort to O. 53 of the Rules of Court 2012 seeking an order of *certiorari* to quash such award.

[14] However, despite there being tremendous progress in the law relating to judicial review in the past 20 years, there nonetheless remain differences between an appellate process and a judicial review process. In this regard, there have been calls by various stakeholders over the years for the law to be amended to allow an aggrieved party to appeal to the High Court against an award. Such requests gained traction and this led to the amendment and the inclusion of s. 33C *vide* Industrial Relations (Amendment) Act 2020 Act A1615. It is apt to set out the actual amendment which reads as follows:

The principal act is amended by inserting after section 33B the following section:

33C. Appeal against an award to the High Court.

(1) If any person is dissatisfied with an award of the Court made under section 30 such person may appeal to the High Court within fourteen days from the date of receipt of the award.

(2) The procedure in an appeal to the High Court shall be the procedure in the Rules of Court 2012 [P.U. (A) 205/2012] for an appeal from a Sessions Court with such modifications as the circumstances may require.

(3) In dealing with such appeals, the High Court shall have like powers as if the appeal is from the Sessions Court.

[15] It is not disputed that the amendment took effect from 1 January 2021. Learned Senior Federal Counsel contends that considering the fact that the reference by the Human Resources Minister (YB) was made *via* letter on 6 January 2021 and the fact that the said awards were handed down on 25 July 2022, *ie*, after the amendment, then s. 33C of the 1967 Act is applicable and that the applicant ought to have filed an appeal to the High Court within 14 days and not commence judicial review proceedings as they have.

[16] The applicant on the other hand relies on a recent decision of the High Court in the case *Thean Heong Sauce Maker v. Industrial Court Malaysia & Anor* [2022] 1 LNS 2104; [2022] MLJU 2159. In that case, the Minister's reference letter was dated 24 August 2020, but the award was handed down on 14 October 2021. The learned Judicial Commissioner Su Tiang Joo referred to s. 33C of the 1967 Act and held that in light of the decision of the Federal Court in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1 which followed the earlier Federal Court case of *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 and the Court of Appeal case of *Ng Chang Seng v. Technip Geoproduction (M) Sdn Bhd & Anor* [2021] 1 CLJ 365; [2021] 1 MLJ 447, the court may nonetheless review by way of judicial review an award of the Industrial Court on grounds of illegality, irrationality and proportionality whereby the court is permitted to scrutinise the decision not only for process but also for substance.

[17] However, in my view, there is on the facts of this case, a more critical basis for holding that the applicant had correctly proceeded *via* judicial review and not *via* an appeal. There are two reasons for this.

[18] Firstly, apart from amending the 1967 Act to insert an appeal provision *via* the new s. 33C, it is to be noted that s. 20 of the 1967 Act in relation to the reference of the representation has also been amended. In this regard, prior to the said amendment, if there was no likelihood of the

representation being settled, the Director General shall notify the Minister and it is the Minister who then has the discretion whether or not to refer the said representation to the Industrial Court for an award. This discretion exercised by the Minister has often in itself been the subject of judicial review applications. However, this provision relating to the Minister's discretion was amended by the Industrial Relations (Amendment) Act 2020 Act A1615 in that the discretion of the Minister has been removed and is now replaced as follows:

> Section 20 of the principal Act is amended:
>
> (b) by substituting for subsection (3) the following subsection:
>
> (3) *Where the Director General is satisfied that there is no likelihood of the representations being settled under subsection (2), the Director General shall refer the representations to the Court for an award.* (emphasis added)

[19] As such, pursuant to the amendment, it is now the Director General who is mandated to refer a representation to the Industrial Court for an award if there is no likelihood of the representation being settled.

[20] As such, in my view, one way to ascertain if an appeal or judicial review is to be utilised is to consider who referred the representation to the Industrial Court for an award.

[21] In my opinion, if the representation was referred to the Industrial Court by the Director General as mandated by the amended provision, then, an appeal ought to be filed pursuant to s. 33C of the 1967 Act as amended.

[22] However, on the other hand, if the representation was referred to the Industrial Court by the Minister, then, quite clearly such reference was made pursuant to s. 20(3) of the 1967 Act as unamended and in which case, judicial review would be the proper application to be made.

[23] On the facts of this case, as highlighted earlier, it was the Minister who referred the representation and not the Director General. In my view, the fact that the Minister's letter was dated 6 January 2021 makes no difference as it was the Minster who was exercising his discretion in referring the representation pursuant to the said 1967 Act as unamended.

[24] Further, my view that judicial review was properly utilised in this case is fortified by the saving and transitional provision in s. 35 of the Amendment Act which provides as follows:

> **35. Saving and transitional provisions.**
>
> (1) Complaints made under section 8, disputes referred under subsection 9(1A), claims for recognition made under section 9, **representations for reinstatement made under section 20 of the principal act**, and all proceedings commenced or awards made before the industrial Court in relation to a reference under subsection 8(2A), subsection 20(3) and section 26 before the coming into operation of this act shall proceed and have effect as if the principal act had not been amended by this act.

(2) All rules and regulations, forms, directions and letter of authorisations made, issued or granted under the principal act shall, to the extent that the rules and regulations, forms, directions and letter of authorisations are consistent with the principal act as amended by this act, continue to be in force until such rules and regulations, forms, directions and letter of authorisations are revoked or amended.

(3) Any investigation, trial or proceedings done, taken or commenced under the principal act immediately before the coming into operation of this act, shall be dealt with as if the principal act had not been amended by this act. (emphasis added)

[25] As highlighted above, the representations for reinstatement under s. 20 of the 1967 Act were made by the two respondents in 2020 prior to the amendments taking effect. As such, in light of the saving and transitional provision, in my view, the applicant was certainly entitled to proceed *via* judicial review proceedings as if the Principal Act has not been amended by the Amendment Act. As such, I have no hesitation in dismissing the objection of learned Senior Federal Counsel and concluding that the applicant had correctly utilised judicial review proceedings in its effort to challenge the two awards.

[26] Having concluded that the appropriate procedure/mode of judicial review was used, I was of the view that the applicant had provided sufficient grounds *via* its affidavit and statement pursuant to O. 53 r. 3(2) of the Rules of Court 2012 for me to grant leave. In this regard, it is trite law that as long as an application is not frivolous or an arguable case has been presented, leave ought to be granted as the threshold at the leave stage is low. (See the Federal Court case of *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296; the High Court cases of *Dhaya Maju LTAT Sdn Bhd v. Kerajaan Malaysia & Anor* [2021] 1 LNS 997; [2021] MLJU 1149 and *Almurisi Holding Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2020] 1 LNS 1439; [2020] MLJU 1631).

Stay Of Execution

[27] On the issue of stay of execution, the applicant highlights in its submissions that the respondents have already issued a winding up notice and that it will suffer irreparable harm should a stay not be granted. It is also contended that they are likely to succeed to quash the awards and that the balance of equity and justice requires a stay of execution be granted. It is further contended that there is a likelihood that the applicant will be unable to recover the award sums should it ultimately succeed in quashing the said awards. (See the case of *Godfrey Philips (Malaysia) Sdn Bhd v. Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan, Malaysia* [2011] 9 CLJ 670).

A **[28]** On the other hand, granting a stay of execution would in effect be depriving the respondents of the fruits of litigation. (See the Court of Appeal case of *Renew Capital Sdn Bhd & Ors v. ADM Ventures (M) Sdn Bhd & Anor And Another Appeal* [2022] 8 CLJ 817; [2022] 6 MLJ 58 and High Court case of *Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd; Tetuan Isharidah, Ho, Chong & Menon (Garnishee)* [2000] 3 CLJ 361; [2000] 6 MLJ 493). In addition, bearing in mind the applicant's continuing financial losses, the respondents certainly have a legitimate fear that they may not be able to recover the award sums ultimately in the event the applicant ceases business.

C **[29]** Having considered the above factors and bearing in mind that I have given parties a hearing date for the substantive judicial review application in April 2023, I ordered a conditional stay in that the applicant is to deposit the award sums with the respondents' solicitors within 14 days to be held in an interest-bearing account pending the outcome of the substantive judicial review application.

[30] In my considered view, this was the most appropriate and fair order to be made so as to allay both parties' fear.

[31] Finally, I ordered that cost be in the cause.